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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. ~~1410~~ 228

CHARLES VIRGIL WHEELER - - Petitioner

Versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

RICHARD E. VIMONT
139 Market Street
Lexington, Kentucky
Counsel for Petitioner

ROBERTS PRINTING CO., FRANKFORT, KY.

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IN THE

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October Term, 1966

No. ———

CHARLES VIRGIL WHEELER - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Charles Virgil Wheeler, defendant in a criminal action prosecuted in the state courts in the Commonwealth of Kentucky, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Kentucky entered on ————————, 1965.

OPINIONS BELOW

The Fayette County, Kentucky, Circuit Court rendered no opinion. The original opinion of the Court of Appeals of Kentucky rendered April 17, 1964, is sufficiently reported at 395 S.W. 2d 565. The mandate of the Court of Appeals of Kentucky has not yet issued. A copy of the opinion appealed from is appended hereto on pages 13-20.

JURISDICTION

The final Opinion of the Court of Appeals of Kentucky was rendered on the date above mentioned and the mandate has not yet issued.

The petitioner has been granted stay of the mandate pending this petition for Writ of Certiorari to this Court and it is expected that the mandate will issue on June 10, 1966. This petition is, therefore, filed within the ninety (90) days prescribed by Rule 22 of the Rules of the United States Supreme Court.

The jurisdiction of this Court is invoked under Title 28, Section 1257 (Sub-section 3).

QUESTION PRESENTED

The petitioner, Charles Virgil Wheeler, was arrested in Ashland, Kentucky, under a John Doe warrant charging armed robbery on September 8, 1961. He was taken to Lexington, Kentucky, on September 10, 1961, and placed in the Fayette County Jail. On September 15, 1961, he was arraigned and advised of the charges and bond set at $25,000.00.

The petitioner was indicted by the Grand Jury of the Fayette County Circuit Court at the October, 1961 term on the 10th day of October, 1961 for the offense of armed robbery. The case was assigned for trial at the January, 1962, term of court. On the day set for trial, the case was, on the motion of the Commonwealth's Attorney, continued until the March, 1962 term of court, the petitioner and his counsel being present and ready for trial.

The petitioner and his counsel appeared again at the March, 1962 term of court and again, upon motion of the Commonwealth's Attorney and supported by his

affidavit, the case was set down for hearing at the June, 1962, term of court.

On June 25, 1962, the petitioner appeared with counsel ready for trial and the case was, on the motion of the Commonwealth, reassigned for June 26, 1962. The next day, with the petitioner and his counsel and witnesses again ready for trial, the original indictment was ordered quashed and the case re-referred to the Grand Jury. This action also being taken at the behest of the Commonwealth's Attorney.

In each of the above instances, the petitioner was present and ready for trial and objected, through counsel, to the delays.

The Grand Jury upon re-referral, indicted the petitioner for the offense of aiding and abetting an unknown person in the crime of assault with an offensive weapon with intent to rob.

The case was later assigned for trial in February, 1963, and petitioner was convicted by a jury of the charge specified and sentenced to twenty-one (21) years in the penitentiary. The question presented is:

> WHETHER IT IS A DENIAL OF PETITIONER'S RIGHT TO A SPEEDY TRIAL UNDER THE PROVISIONS OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES WHERE THE AUTHORITIES OF THE COMMONWEALTH OF KENTUCKY UNREASONABLY CONTINUED TRIAL OF THE CASE ON THREE SEPARATE OCCASIONS AND FURTHER RE-REFERRED THE CHARGES TO THE GRAND JURY IMPOSING MORE DELAY.

The pertinent section of the Constitution of the United States involved is:

AMENDMENT VI.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . ."

AMENDMENT XIV.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 8, 1961, in the early morning hours, the Springs Motel in Fayette County, Kentucky, was robbed by a person whose identity has never been established in this case. Charles Virgil Wheeler was arrested the same evening under a John Doe warrant in Ashland, Kentucky, while enroute with his wife and two children by train from Huntington, West Virginia, to Columbus, Ohio. He was charged with the crime of armed robbery in connection with the Springs Motel incident. After two days, he was transferred to Fayette County, Kentucky, where he was placed in custody without bond until arraigned some five days later in Lexington Police Court. Later that month he was indicted by the Fayette County Grand Jury for the offense of armed robbery and was subsequently released on surety bond.

He employed counsel and began preparation of his case which was assigned for January 18, 1962. Due

to the fact that many of his witnesses were in the Ohio-West Virginia area, he had some difficulty in presenting them. However, he, with his counsel and witnesses, appeared on the said date prepared for trial. On motion of the Commonwealth's Attorney, the cause was continued until the March, 1962 term of court, this motion being based on the fact that material witnesses had not been subpoenaed by the Commonwealth. Defendant announced ready.

On April 19, 1962, the next date set for trial of this case, defendant Wheeler again brought his witnesses, and with counsel announced ready for trial. On this occasion, the Commonwealth's Attorney again moved for a continuance, and, in the face of his previous request having been granted upon no actual showing of the need, was forced to produce an affidavit setting out the fact that one T. E. King, the alleged victim of the robbery, was ill and unable to attend. Counsel for defendant objected but the Court granted the request of the Commonwealth. The case was rescheduled for the June, 1962 term.

Mr. Wheeler, for the third time, journeyed from his home in Eastern Kentucky, gathered his witnesses and with counsel appeared before the tribunal, ready again for trial on June 25, 1962, some ten months and two continuances after his indictment for armed robbery. After some deliberation concerning the indictment, the trial was continued until the following day on motion of the Commonwealth. Mr. Wheeler was to have his day in Court!

But the Commonwealth, having the benefit of some ten months of preparation and having subjected the defendant to preparation of its case in relation to the charge of armed robbery, found another way out.

This time it was a motion to quash the original indictment and re-refer the matter to the next Grand Jury! The defendant could not expect settlement for some time to come.

What followed was what could have been the case in the first instance.

Another five months passed before the Grand Jury was to meet again, with no indication to the defendant of what charge may be placed against him this time and providing no basis on which to begin preparation of a defense. It was as if he were suspended in a vacuum of unknown accusations.

October 11, 1962, more than a year since his previous indictment, found the Fayette Grand Jury handing down a true bill, indicting Wheeler for the offense of "aiding and abetting an unknown person in the crime of assault with an offensive weapon with intent to rob T. E. King."

Suffice to say, the Commonwealth did not press again for a continuance and the case went to trial, some eighteen months after the defendant was placed in the position of being before the Court. Suffice to say, the Commonwealth, if not the appearance-worn defendant, were ready to afford "due process".

The Court of Appeals of Kentucky in its opinion offering the subsequent conviction of the defendant, did not see fit to look into the full record of the case, relying only on the period between the second indictment and trial, full-well knowing of the previous indictment and its attendant arbitrary and capricious continuances:

> "The jury trial was held February 5, 1963. The lapse of four months between time of indictment and trial does not reflect abnormal delay."

The Court went on to say that the record sent from Fayette Circuit Court did not include the documents corroborating the previous indictment and the subsequent continuances, but it is readily apparent that the facts were sufficiently before the Court on the face of the record.

Such "head-in-the-sand" attitudes are not reasonable in construing due process. In *State of Maryland* v. *Karek*, 233 F. Supp. 431 (1964)

> "The Fourteenth Amendment, however, protects a defendant in a criminal proceeding in a State Court when his trial not only is not speedy but has been subject to a delay so unreasonable as to deprive him of due process."

REASONS FOR GRANTING THE WRIT

The decision of the Kentucky Court of Appeals should be reviewed because the Commonwealth of Kentucky, in prosecuting the defendant for aiding and abetting an unknown person in the crime of assault with an offensive weapon with intent to rob, denied the defendant a speedy trial to the extent that the delay was so unreasonable as to deprive him of his liberty without due process of law as guaranteed him by the Fourteenth Amendment to the United States Constitution.

While the Sixth Amendment provides the accused in criminal prosecutions the right to a speedy trial this right is not applicable to state criminal actions unless and until the state's failure to grant a trial without undue delay becomes so unreasonable that the accused is deprived of his life, liberty, or property without due process of law. It is when this situation arises that the Fourteenth Amendment protects the

rights of the defendant and through the due process clause of that Amendment guarantees him a speedy trial.

The Fourteenth Amendment not only guarantees the accused a speedy trial in the sense of passage of time between indictment and trial but, and most importantly, the due process clause also guards against *any* delay on the part of the state which is so unreasonable that it tends to deprive the defendant of his life, liberty, or property, without due process of law, *State of Maryland* v. *Karek,* 233 F. Supp. 431 (1964).

In other words, the mere passage of days, months or even years, does not, in itself, determine whether the right to a speedy trial has been abridged. The determining factor in assessing whether a speedy trial has been granted, is whether any delay is justified and if so, how much delay in the trial of the accused may be permitted by the state before it becomes so unreasonable as to violate the due process clause.

It is conceivable that one day's delay could be unreasonable while under other circumstances five years' delay would not be unduly long.

It is the contention of the defendant in this criminal proceeding that the delay by the Commonwealth of Kentucky in prosecuting him under the original indictment of armed robbery and the subsequent indictment and conviction for aiding and abetting an unknown person in assault with an offensive weapon with intent to rob so delayed the trial on these charges that they did not grant the accused a speedy trial and therefore deprived him of his liberty without due process of law.

The defendant appeared before the Fayette Circuit Court, Criminal Division, four times, January 18, 1962, April 19, 1962, June 25, 1962 and June 26, 1962.

At each appearance he was with counsel and ready for trial. The Commonwealth asked for, and received two continuances for failure to have material witnesses present (R-1A), once failing to request subpoenas for material witnesses (R-1M, 10), and, after having the case assigned for trial on June 26, 1962, moved to quash the indictment for armed robbery and re-referred the case to the Grand Jury. The Grand Jury returned a new indictment on October 11, 1962 (R-1C), and defendant was tried and convicted on February 4, 1963.

The two continuances and the quashing of the original indictment by the Commonwealth while covering a period in time of only ten months, form the basis for this request for review of this decision. While the time span was not, perhaps, unreasonable the delay in prosecuting the action was so unreasonable that the defendant's rights under the Fourteenth Amendment were violated.

The Commonwealth had indicted the defendant for armed robbery but, either because they could not, even with the vast resources at their command, gather their witnesses for trial, or, and as the quashing of the original indictment would indicate, they did not feel they could successfully prosecute their case.

During this ten month period defendant and his counsel prepared to defend against the charge of armed robbery. Three times defendant gathered his witnesses and appeared, ready for trial, only to be put off until a later date and then to see the indictment quashed and the matter re-referred to the Grand Jury.

This delay by the Commonwealth in prosecuting the armed robbery charge brings this case within the factors which are relevant in a consideration of whether denial of a speedy trial assumes due process pro-

portions. In *United States* v. *Simmons,* 338 F 2d 804 (1964), these factors are set out as (1) length of delay, (2) reasons for delay, (3) prejudice to the defendant, and (4) waiver by defendant.

It is the contention of the defendant that any action by the Commonwealth which is unreasonable in relation to any one of the above factors would deprive the defendant of his liberty without due process of law. Certainly the length of delay in this criminal proceeding was unreasonable, not in the time span itself, but in the light of *State of Maryland* v. *Karek,* supra, because the delay was caused by the obvious desire of the Commonwealth to delay trial in order to strengthen its case against the defendant.

This precise reason causes the delay of ten months under these facts to be so unreasonable as to deprive the defendant of his liberty without due process of law under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSIONS

We respectfully submit that the methods employed by the Commonwealth's Attorney in securing continuances for the purpose of aiding prosecution amounted, by the unreasonableness of the actions, to a denial of defendant's rights under Amendments VI. and XIV. to the Constitution of the United States.

What constituted the denial of due process by this unreasonableness? Even in retrospect, it is apparent that the Commonwealth never intended to attempt trial of this defendant under the indictment for armed robbery. What motives then, prompted the Commonwealth to three continuances over a period of three Grand Jury Sessions before re-referral? Namely, to

tailor-make a charge so nebulous as to lessen the odds of acquittal at some later trial date. It is not this attempt alone that taints the method employed, but it is the fact that defendant was forced to undergo the pre-trial expenses and anxiety on four separate occasions over ten months while the prosecution knew on each occasion that the case would not be brought to trial under this indictment. In other words, the defendant, though ready for trial on each occasion, finds himself at the mercy of prosecution procedures while being denied the due process supposedly his right under the Constitution.

Is the state of our procedural system such as requiring of Charles Wheeler, a true unknown, to do so much more than is expected of the Government? On each occasion he subjected himself to the Court for trial. The Commonwealth was not ready for trial on five occasions over a period of eighteen months. Are the guarantees of the Constitution only applicable to the Commonwealth of Kentucky so as to allow its procedures in a criminal action to be blessed with the fort of "due process", while subjecting an accused to the rigors of inquisitorial tactics? We believe not. There is always a line which our courts draw in affording defendants consideration. Can we not require the courts to do the same when it is the Governmental body pressing for considerations beyond the reasonable?

Charles Wheeler has been denied. He was denied trial on four separate occasions due to questionable motives on the part of the Commonwealth. He was denied his plea by the Court of Appeals of Kentucky by its failure to scan the obvious record. We respect-

fully request that this Court not follow the precedent set below and afford the defendant, for the first time, the consideration due him under his rights.

We respectfully submit that this Court grant a review of his case.

RICHARD E. VIMONT.
139 Market Street
Lexington, Kentucky
Counsel for Petitioner

COURT OF APPEALS OF KENTUCKY

(Rendered: April 17, 1964)

CHARLES VIRGIL WHEELER - - - - *Appellant*

V. APPEAL FROM THE FAYETTE CIRCUIT COURT
HONORABLE JOSEPH J. BRADLEY, JUDGE

COMMONWEALTH OF KENTUCKY - - - *Appellee*

OPINION OF THE COURT BY COMMISSIONER DAVIS
AFFIRMING

Charles Virgil Wheeler seeks reversal of his conviction in the Fayette Circuit Court of the offense of aiding and abetting an unknown person commit the crime of armed assault with intent to rob. Appellant has been sentenced to imprisonment for twenty-one years upon the jury's verdict of his guilt of the offense. KRS 433.150.

Appellant rests his appeal upon four claimed errors: (1) the indictment was defective for failure to name the principal or give a description of his acts or participation in the crime charged; (2) there was a fatal variance between the allegations of the indictment and the proof; (3) appellant was denied the constitutionally guaranteed speedy trial; and (4) the evidence does not support the verdict.

On September 8, 1961, T. E. King was on duty as night auditor and desk clerk at Springs Motel at Lexington. About 5:30 a. m., he responded to a knock at the door, and unlocked the door to admit a man who told him he wished to pay his bill and check out of the motel. King then locked the door, leaving the key in it, and started to go behind the desk to attend the matter of checking out the "guest" when the latter put a .45 automatic pistol in King's back. King then understandably responded to the commands of the intruder; King was required to lie face down upon the floor of the dining room. The intruder, whose identity has never come to light, placed napkins across King's mouth, and tied King's hands and feet. Just prior to tying King, the intruder kicked him in the face and directed him to lie in such manner as his face would be flat on the floor.

King testified that he heard noises from the motel lobby indicating the prizing open of the cash register and some cabinets in the office. After about five minutes a man came in and kneeled down behind King and asked him whether he was all right; upon King's telling him that he was all right, this man reached into King's pocket and removed his card case—there was no money in it. Then the man told King: "You lay there and nothing will happen to you." King then heard "them" take a crowbar "or something" and prize open a cash register in the dining room, just behind where he lay; then the intruders left. King was easily able to free himself, and immediately telephoned the police. The officers reached the scene about five or ten minutes later.

Examination of the motel premises by the police revealed that checks and cash aggregating about $900 had been taken. King did not know, nor was he ever

able to identify the first man who came in the motel office. However, he told the police that the man who had asked him whether he was all right was the appellant. King explained that he had known appellant as a frequent guest at another motel during times of King's employment there. He asserted that he was quite familiar with the voice of appellant, and that he recognized appellant as the man who had spoken to him and removed the card case from his pocket. At the trial King said that appellant's voice is distinctive and that he had no doubt of the accuracy of his identification. It developed that King had not talked with appellant for about one year before the robbery. On the next day after the robbery, King identified a photograph of appellant at the Lexington police station.

At 11:40 p. m. on September 8, 1961 (the day of the robbery), appellant was arrested at Ashland while aboard a train bound for Columbus, Ohio. Search of appellant was made incident to that arrest; in his billfold were found two checks, each of which was shown to have been among the articles taken from the Springs Motel in the robbery just described. The checks were in sums of $6.18 and $97.00, respectively. Appellant claims that he acquired the checks, with some others, at about 3:00 or 3:30 p. m. September 8, 1961, from a man he named as either James Lawson or James Lawrence—he was not sure which. Appellant said that he cashed checks in the total sum of about $186 for Lawson-Lawrence at a restaurant in Portsmouth, Ohio, on the occasion mentioned. He offered no plausible explanation as to the absence of an endorsement of Lawson-Lawrence on the checks. Appellant's own evidence, supported by testimony from his wife, tended to establish an alibi. He insisted that he was in Huntington, W. Va., at the time of the

robbery, and had not been in Lexington for four or five months before the robbery date.

The indictment was returned by the Fayette County grand jury October 11, 1962, and in pertinent part is as follows:

> "The Grand Jury — accuses Charles Virgil Wheeler of the crime of unlawfully, maliciously and feloniously aiding and abetting a person unknown to this Grand Jury in an unlawful, malicious and felonious assault with an offensive weapon upon T. E. King with the felonious intent to rob the said T. E. King committed as follows, viz: That said person unknown to this Grand Jury— did with an offensive weapon, to wit a pistol, unlawfully, maliciously and feloniously make an assault upon T. E. King, with the felonious intent then and there to rob him, the said T. E. King of money or property of value, and that the said Charles Virgil Wheeler was then and there present at the time of said assault and did unlawfully, wilfully and feloniously aid, abet, advise, counsel and encourage the said person whose name is unknown to this Grand Jury in the commission of said crime - - -."

Appellant asserts that failure to name the principal offender is a fatal deficiency in the indictment. In support of his contention he relies on Mulligan v. Com., 84 Ky. 229, 1 S. W. 417, and Christian v. Com., Ky., 255 S. W. 2d 998. In Howard v. Com., 110 Ky. 356, 61 S. W. 756, it was noted that the principle enunciated in the Mulligan case was subject to the reasonable exception that is presented here. The Howard case specifically recognized the validity of an indictment naming an unknown principal. Smith v. Com., 262 Ky. 6, 89 S. W. 2d 3, stands for the same

proposition. We conclude there is no merit in this phase of appellant's contentions.

The related attack on the indictment also fails. Appellant contends that the indictment does not sufficiently detail the activities of the unknown principal to satisfy the requirements of Sections 122 (2) and 124 (4) of the Criminal Code, in effect when the indictment was presented. As frequently pointed out, the object of the indictment under the former Criminal Code is to inform the defendant of the offense with which he stands charged; this may be done by a statement of the acts constituting the offense in such manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case. Smith v. Com., 262 Ky. 6, 89 S. W. 2d 3. The quoted language of the indictment adequately recites the description of the acts of the unknown principal as well as the conduct of the accused appellant.

The position is taken that since the indictment charges that the crime was committed with the intent to rob T. E. King of money or property, there was a fatal variance when the evidence reflected that the items taken were assets of Springs Motel. In support of this argument appellant cites Lissenbee v. Com., 198 Ky. 639, 249 S. W. 782; Williams v. Com., 314 Ky. 33, 234 S. W. 2d 148; Sturgill v. Com., Ky., 293 S. W. 2d 730, and cases from other jurisdictions.

In Lissenbee the indictment charged robbery from Felix Turner; the proof showed robbery from Felix Napier. This was held to be a material variance—not on the theory that the title to the taken property was the crux of the matter, but that the act of robbing

Felix Napier is not the same act as robbing Felix Turner. Thus, the accused could not properly know what defense to prepare, nor would prosecution under the Lissenbee indictment afford a defensive bar to subsequent prosecution for robbing Felix Napier. In the case at bar it is charged and proven that the crime under investigation is the armed assault of T. E. King with intent to rob. This prosecution effectively bars further prosecution of this appellant for the same offense.

Williams v. Com., 314 Ky. 33, 234 S.W. 2d 148, involved prosecution for grand larceny. The indictment charged that the items stolen were personal property of Inland Steel Company. On proof, it developed that an overcoat which had been taken from the store of Inland Steel was in fact the individual personal property of Sam Wallen—not Inland Steel. Since the accused's connection with the offense was based on that overcoat, we held that there was fatal variance. Sturgill v. Com., Ky., 293 SW 2d 730, follows Lissenbee and Williams; the fatal variance in that larceny prosecution lay in the fact that the indictment charged theft of property owned by George Evans, whereas the proof showed the property belonged to Glo Valley Coal Corporation.

The case at bar is not ruled by the cases just mentioned. Here the offense charged is armed assault with intent to rob. KRS 433.150. We have held that this offense is not the same offense as robbery, and that the gravamen of the crime denounced in KRS 433.150 is the assault. Adams v. Com., Ky., 264 S. W. 2d 283; Lamb v. Com., 266 Ky. 561, 99 S. W. 2d 441; Thomas v. Com., Ky., 291 S. W. 2d 550; Riley v. Com., 278 Ky. 732, 129 S. W. 2d 581. The offense may be

consummated without any robbery—without the taking of any property—it is the assault with intent so to do that constitutes the crime, when that assault is otherwise within the purview of the statute. We conclude, therefore, that there is no merit in the appellant's claim that there was a fatal variance.

Ky. Constitution, Section 11, guarantees an accused a speedy trial. Appellant complains that he was not accorded one. We disagree. As noted, the indictment was returned October 11, 1962. The jury trial was held February 5, 1963. The lapse of four months between time of indictment and trial does not reflect abnormal delay. Appellant cites nothing to support that view. However, he points out that the offense was committed on September 8, 1961, and in his brief states that an earlier indictment had been returned in September, 1961. But there is nothing in this record to present that matter to us for review; we may not consider the unsupported statements in briefs as a part of the record for review. 2A Ky. Digest, Appeal & Error, Key #714 (5). Review of the record that is before us discloses no effort by appellant to bring the case on for trial at an earlier time, nor any order or motion for continuance in behalf of the Commonwealth. If it were arguable that appellant was denied speedy trial—and we believe that it is not arguable here—it is to be observed that he has taken no step to avail himself of the claimed error. See 14 Am. Jur., Criminal Law, Sec. 138, pages 863-864.

Finally, the appellant insists that the evidence does not support the verdict. The victim, T. E. King, positively identified appellant as present and participating in the offense, appellant was found in possession of two checks taken in the robbery; his explana-

tion of his having them was tenuous at best, and the jury was not bound to believe him. It seems to us that the verdict is abundantly supported by the evidence. It complies with our rule that any evidence of substance which goes toward the establishment of guilt is sufficient to make a jury issue. Parsley v. Com., Ky., 273 S. W. 2d 372 and 6 Ky. Dig. 1, Criminal Law, Key #562.

Judgment is affirmed.

Attorney for Appellant:

RICHARD E. VIMONT
139 Market Street
Lexington, Kentucky

Attorneys for Appellee:

ROBERT W. MATTHEWS, Attorney General
JOHN B. BROWNING, Asst. Attorney General
Frankfort, Kentucky

DONALD MALONEY
Commonwealth's Attorney
Bank of Commerce Building
Lexington, Kentucky

COURT OF APPEALS OF KENTUCKY

CHARLES VIRGIL WHEELER - - - - *Appellant*

Vs. *ORDER*

COMMONWEALTH OF KENTUCKY - - - *Appellee*

IT IS ORDERED by the Court that the issuance of the Court's mandate in this case be stayed for a period of 30 days from this date for the purpose of permitting appellant to make application to the Supreme Court of the United States for a writ of certiorari.

Entered this May 11, 1966.

JOHN R. MOREMEN
Chief Justice